

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
ROBERT J. GLADWIN, JUDGE

DIVISION II

CACR07-865

MARCH 19, 2008

JERRY PEELE		APPEAL FROM THE PULASKI
	APPELLANT	COUNTY CIRCUIT COURT
		[NO. CR2006-3657]
V.		HON. CHRISTOPHER C. PIAZZA,
		JUDGE
STATE OF ARKANSAS		
	APPELLEE	AFFIRMED

Appellant Jerry Peele was convicted in Pulaski County Circuit Court on April 27, 2007, of aggravated robbery and kidnapping and received a sentence of 480 months' imprisonment. On appeal, he claims that the trial court erred in denying his motion for directed verdict and by declining to grant his motion for continuance. We affirm.

Appellant stood trial on April 16, 2007, on the charges of aggravated robbery and kidnapping.¹ He was charged as an habitual offender. On the morning of trial, appellant sought a continuance because he had recently received an insurance settlement in the amount of \$13,500, and wanted to hire private counsel. Appellant told the trial judge that he had

¹The trial court continued the original trial date from February 28, 2007, pursuant to defense counsel's request for a continuance because of his wife's scheduled surgery.

spoken with two lawyers who were willing to take his case, but had not retained either one. The trial court noted that the case had been set for a long time and that the jury was already present in the courthouse. The trial court also noted that no private counsel had appeared to try the case, and when contacted by the trial court, at least one of the lawyers denied having been hired by appellant. The trial court ultimately denied appellant's motion for continuance. Appellant then told the trial court that he would not cooperate with his appointed attorney, as he was not the attorney of his choice, and refused to remain in the courtroom during the trial. Appellant was informed that the trial would continue without him.

At trial, Tramale Wright, the victim, testified that he was working as a clerk for E-Z Mart on Camp Robinson Road in North Little Rock, on July 7, 2006. On that date, Wright was outside the front of the store when appellant approached. When Wright went back inside the store, appellant walked in behind him, grabbed Wright behind his neck, and forced something hard against Wright's back saying, "You know what this is, it's a robbery, give me everything out of the register." Wright testified that he did not know what was forced against his back, but that he thought at the time that it was a knife or a gun and that he was scared. After Wright gave appellant the money from the register, appellant walked Wright to the bathroom, tied Wright's hands with the apron Wright was wearing, and told him to face toward the toilet and lie down. Wright testified that he did not go to the bathroom and lie down voluntarily, but was forced to do so, and that he believed that appellant had some kind of deadly weapon. Wright said that, as appellant exited the bathroom, he dropped something that looked like a potato peeler. Wright claimed that, had he known the item was a potato

peeler all along, he still would have cooperated with appellant because of the risk. Wright said that appellant tied him loosely and that he was able get up and call police fifteen seconds after appellant left the building.

Detective Dan Pederson of the North Little Rock Police Department testified that he was assigned to investigate the robbery and that he put together a photographic line-up for Wright, who identified appellant. When Detective Pederson contacted appellant, appellant gave a statement that was recorded and transcribed. In the statement, appellant admitted to robbing the store because he needed the money for drugs. He also admitted to putting an object at Wright's back, which he hoped that Wright would think was a gun. Appellant claimed in his statement that he did not have a gun, but that he had a writer's quill marker.

After Detective Pederson's testimony, the State rested. The defense then rested without presenting evidence and asked to approach the bench. The trial judge called for a break, and when the court reconvened, it took up the issue of jury instructions. Subsequently, defense counsel asked to put something on the record and moved for a directed verdict on the aggravated robbery charge, which was denied, and the kidnapping charge, which was also denied. The defense then rested a second time, and the trial court took another break. When the court reconvened, the trial court charged the jury, and both sides presented closing arguments. The jury returned with a unanimous guilty verdict on both charges.

During the sentencing phase, evidence was presented to the jury of appellant's criminal record and previous felony convictions. After the trial judge instructed the jury, both sides

presented closing arguments, and the jury returned with a sentence of 480 months' imprisonment for aggravated robbery and sixty months' imprisonment for kidnapping, said sentences to run concurrently. The trial judge attempted to have appellant brought into the courtroom so that he might be informed of his conviction and sentence, but appellant refused to cooperate, and the trial judge noted that he did not want to risk harm to his bailiffs or appellant by forcing appellant to appear before him. The judgment and commitment order was filed on April 27, 2007, and appellant filed a timely notice of appeal. This appeal followed.

Directed-verdict motion

Substantial interference is required for a kidnapping conviction under the criminal code. Ark. Code Ann. § 5-11-102 (Repl. 1995). Appellant contends that the charge of kidnapping should not have gone to the jury because the State failed to show that he substantially interfered with the victim's liberty. He argues that the victim was only restrained for about fifteen seconds and that he was tied loosely, which appellant claims does not amount to substantial interference. Therefore, appellant challenges the sufficiency of the evidence by claiming that the trial court erred in denying his motion for directed verdict.

Arkansas Rules of Criminal Procedure 33.1 governs the procedure for challenging the sufficiency of the evidence at a jury trial and provides that a motion for directed verdict must be made at the close of the State's case, and renewed at the close of all of the evidence. Appellant's argument is not preserved for appellate review because the defense failed to make a directed-verdict motion at the close of the State's case. Instead, the defense waited until

after it rested and the parties conferred regarding jury instructions before the motion for a directed verdict was made. After the motion was denied, the defense again stated that it rested without renewing its motion. To preserve for appeal an issue of the sufficiency of the evidence in a jury trial, the defendant must move for a directed verdict at the close of the State's evidence and must renew it at the conclusion of all the evidence. Ark. R. Crim. P. 33.1(a) (2007); *see also Fisher v. State*, 84 Ark. App. 318, 139 S.W.3d 815 (2004); *McClina v. State*, 354 Ark. 384, 123 S.W.3d 883 (2003). Accordingly, the trial court's denial of appellant's motion for directed verdict is affirmed.

Motion for continuance

A motion to change attorneys is treated as a motion for continuance because a change of attorney close to trial would require that a continuance be granted. *E.g., Edwards v. State*, 321 Ark. 610, 906 S.W.2d 310 (1995). We review the grant or denial of a motion for continuance or stay under an abuse-of-discretion standard. *Stenhouse v. State*, 362 Ark. 480, 209 S.W.3d 352 (2005). An appellant must not only demonstrate that the circuit court abused its discretion by denying the motion but also must show prejudice that amounts to a denial of justice. *Id.* Moreover, in considering whether the court's discretion has been abused in a particular case, the circumstances of the case must be examined with emphasis on the reasons presented to the judge at the time. *Stephens v. State*, 277 Ark. 113, 640 S.W.2d 94 (1982).

Appellant claims that the trial court's denial of his motion for continuance constituted an abuse of discretion. Arkansas Rule of Criminal Procedure 27.3 states:

The court shall grant a continuance only upon a showing of good cause and only for so long as is necessary, taking into account not only the request or consent of the

prosecuting attorney or defense counsel, but also the public interest in prompt disposition of the case.

Appellant argues that his motion was based on his newly-acquired ability to hire private counsel, not solely for the purpose of delay.

Appellant cites as controlling *Taylor v. State*, 77 Ark. App. 287, 75 S.W.3d 708 (2002), where the defendant requested a continuance on the day of trial in order to hire his own lawyer with newly-acquired money from his tax returns. The defendant alleged that he had not had an opportunity to go over the file with his court-appointed attorney and he wanted to hire a different attorney. The trial court denied the defendant's request and allowed him to proceed to trial without counsel or a proper waiver of counsel.² The State conceded that the record failed to demonstrate that the defendant knowingly and intelligently waived his right to counsel. Therefore, we reversed the trial court's refusal to grant a continuance, stating:

In rendering our decision we note that the trial court's denial of appellant's request for counsel cannot be justified based on appellant's belated request for a continuance on the day of trial. As observed by the State, the record fails to reveal that appellant had previously requested any continuances. Indeed, appellant was incarcerated pending trial and told the court that he had received his tax returns and had the money to hire a lawyer. Appellant also told the court that if the motion was granted, he would "take care of this matter at the next court date." The record unequivocally supports a conclusion that appellant's request for a continuance in order to obtain counsel was not an attempt to delay the trial or to obstruct the criminal justice system.

Id. at 294-95, 75 S.W.3d at 712.

The instant case is distinguishable from *Taylor, supra*. Most importantly, appellant's waiver of his right to counsel is not at issue here as it was in *Taylor*. Here, appellant was

²Taylor did have the assistance of stand-by counsel. See *Taylor*, 77 Ark. App. at 291, 75 S.W.3d at 710.

represented by able counsel, just not the counsel he hoped to hire. The defendant in *Taylor* asserted that his appointed counsel had not adequately prepared for trial and had not filed necessary suppression motions. Here, appellant made no such assertions about appointed counsel. Also, the trial court noted that appointed counsel was competent and had worked on appellant's case from the beginning. Further, appellant herein made no indication that he was unsatisfied with his appointed counsel at other hearings prior to the trial, which also distinguishes the instant case from *Taylor*.

Accordingly, we hold that the trial court did not abuse its discretion in denying appellant's motion for continuance to obtain a new attorney.

Affirmed.

GLOVER and VAUGHT, JJ., agree.